SOVEREIGN GENERAL INSURANCE SDN. BHD. v. SYARIKAT KERATONG LOGGING SDN. BHD.

[O.C.J. (Mohamed Zahir J.) October 14, 1975]
[Seremban — Civil Suit No. 160 of 1975]

Practice and Procedure — Liquidated claim — Writ filed — Defendants' non-appearance — Judgment in default of appearance entered by the plaintiffs — Application by the defendants to set aside said judgment — R.S.C., 1957, O.13 rr. 2 & 7 and O.27 r.11.

The plaintiffs filed a writ for a liquidated claim against the defendants but the latter failed to enter appearance. Subsequently, the plaintiffs entered a judgment in default of appearance against the defendants. The latter then applied to set aside the default judgment on the grounds, *inter alia*, that the defendants had a good defence to the plaintiffs' claim, and that there was an oversight by an officer of the defendants' company in not taking steps to have the appearance filed.

Held, dismissing the defendants application: (1) the explanation advanced by the defendants was not satisfactory because the officers concerned being experienced in this field dealing with claims and litigations could not be expected to make such a mistake;

(2) the defendants had failed to show a *prima facie* defence and a mere assertion that they had a good defence and nothing more was not sufficient.

Cases referred to:-

(1) *Abbey Panel & Sheet Metal Co. Ltd.* v. *Barson Products* [1947] 2 All E.R. 809.

(2) *Evans* v. *Bartlam* [1937] A.C. 473.

(3) *Tee Liam Toh* v. *National Employer's Mutual General Insurance Association Ltd.* [1964] M.L.J. 320.

(4) *Parker* v. *Lewis* L.R. 8 Ch. App. 1035, 1059.

CIVIL SUIT.

Dulip Singh for the defendants.

Dato' Wong Seng Chow for the respondents.

Mohamed Zahir J.: In this Suit the plaintiffs on September 11, 1975 entered a judgment against the defendants in default of appearance.

The action was commenced by a Generally Indorsed Writ and a Statement of Claim was served with the writ of summons. The defendants are now applying to set aside the default judgment. Counsel for defendants submitted three grounds why the judgment should be set aside:

(a) That the judgment was irregular as the plaintiffs had asked for a declaratory order in paragraph 19(1) of the statement of claim and as such the plaintiffs should have set down the action for mention for judgment under Order 27 rule 11.

(b) That there was an oversight by an officer of defendants' company in not taking steps to have the appearance filed.

(c) That the defendants have a good defence to the plaintiffs' claim.

As to ground (a) I am of the opinion that the judgment was regular and although the endorsement in the writ contained a prayer for two declaratory orders, they were abandoned and only the liquidated sum of $7,632 under the workmen's compensation policy was claimed together with the normal interest thereon at 5% per annum. The amount claimed is liquidated as envisaged under Order 13 rules 2 and 7 of the Rules of the Supreme Court.

In *Abbey Panel & Sheet Metal Co. Ltd.* v. *Barson Products (a firm)*[1] Evershed L.J., stated on page 811 as follows: —

"... The intended scope and purpose of R.S.C., Order 13, rules 3-7 inclusive, appear to me to be reasonably plain. They provide that where a plaintiff has in his writ made a claim against a defendant for one or more of the following, viz., (a) a debt or liquidated demand, (b) detinue, and (c) pecuniary damages, and such defendant, though properly served, does not choose to appear to the writ, then the plaintiff may, without having to take any further steps against that defendant, obtain judgment against him for his claim — in the case of a liquidated demand, a final judgment, in the other cases, an interlocutory judgment subject to assessment by the court of the monetary amount he is entitled to recover...."

The defendants' first ground must therefore fail.

I shall take grounds (b) and (c) together. In *Evans* v. *Bartlam*[2] Lord Atkin had laid down the rule that the applicant must produce to the court evidence that he had a *prima facie* defence and that there was no such rule that applicant must satisfy the court that there is a reasonable explanation why judgment was allowed to go by default, such as mistake, accident, fraud or the like, although such explanation may be one of the matters to which the court will have regard in exercising its discretion (see *Mallal's* Supreme Court Practice page 336). In this case the defendants stated that they had a good defence.

The claim arose from a Workmen's Compensation Policy dated December 1, 1972 between the parties herein in which the plaintiffs alleged that under the said policy the defendants in consideration of the premium of $4,410 paid to them by the plaintiffs agreed to indemnify the plaintiffs against all sums for which the plaintiffs shall be held liable in respect of personal injury by accident or disease to any employee of the plaintiffs arising out of and in the course of the plaintiffs' employment. On or about March 3, 1973 one Keng Kee Heng alleged by the plaintiffs to be their employee was killed during his employment with the plaintiffs. The plaintiffs notified the defendants about the death and transmitted to them the relevant claim documents and subsequently the widow and a son of the deceased instituted claims under the Workmen's Compensation Ordinance, 1952 against the plaintiffs. The plaintiffs did not consent to judgment in the ensuing inquiry and the matter was referred to the arbitration under the said ordinance and the disputed matters were as follows:—

(i) that the deceased was a workman under the Workmen's Compensation Ordinance No. 85/1952;

(ii) that the accident to the deceased Keng Kee Heng arose out of and in the course of employment; and

(iii) that the respondents (the plaintiffs herein) were liable to pay $7,200 as claimed by the two applicants.

The arbitrator made the order that the respondents do pay the sum of $7,200 to the applicants and the costs of the action.

The defendants did not take any steps to defend the inquiry in the Labour Office or at the arbitration. They contended that they were not liable to pay to the plaintiffs anything under the policy on the ground

that the policy, as alleged by them only provided coverage for plaintiffs and not any other sub-contractors and that the deceased was not the employee of the plaintiffs but the employee of another contractor.

The plaintiffs filed the writ but the defendants had failed to enter appearance. The explanation given was that the Executive Officer of the defendants' company failed immediately to pass over or refer the writ to the defendants' Claim Director, due to pressure of work and the writ was enclosed in a wrong claim file.

The explanation advanced by the defendants did not at all appear to be satisfactory because the officers concerned being experienced in this field dealing with claims and litigations could not be expected to make such a mistake and furthermore even if the writ was enclosed in a wrong file, an appearance should have been entered in another suit. This was not shown to be the case. Any way the requirement to enable the court to set aside the default judgment is that the defendants must show a *prima facie* evidence. I was not satisfied that they had succeeded in doing so. They had failed to establish that they were not liable under the policy. Paragraphs 10 and 11 of the defendants' Claim Director's amended affidavit dated December 3, 1975 merely stated that the defendants had a good defence and that they had repudiated liability. Paragraph 12 of the same affidavit alleged that there were issues of law involved. But nowhere was it adduced as to how the defendants had a good defence in fact as well as in law. I am of the opinion that a mere assertion that they had a good defence and nothing more is not sufficient to establish a *prima facie* defence. The policy was not exhibited to show as to how or under which provision or clause that the defendants were not liable. The other amended affidavit filed on behalf of the defendants also dated December 3, 1975 sworn by the defendants' Executive Officer centred on the oversight in not filing the appearance and about their earlier denial of liability. The Claims Director's affidavit even alleged that one of the reasons for not entering an appearance was that they had not received any instructions from their solicitors and admitted that the defendants had previously been in correspondence with the plaintiffs in respect of the claim which was all the more reason why they should not have overlooked the plaintiffs' writ.

In *Tee Liam Toh* v. *National Employer's Mutual General Insurance Association Ltd.*[3] it was held that once the employer's liability had been established by a competent tribunal namely the President of the Sessions Court as arbitrator the insurance company were precluded from raising the same questions again. In that case, the issue as to whether the employer was entitled to be indemnified by the insurance company was further referred to arbitration and two of the five matters in difference were —

"(c) whether the said workman was covered by the policy No. F 54707;

(d) whether the first party has committed a breach of condition 2 of the policy of insurance."

Ong J., as he then was, held that the only matter in difference which really fell to be decided by the arbitrator was whether or not the applicant as the insured was in breach of any of the conditions of the policy particularly condition 2 which would disentitle him to the indemnity under the policy and the award by the President, Sessions Court was held to be an estoppel. The learned judge also quoted in that case Mellish L.J., in *Parker* v. *Lewis*[4] which, I think, is useful to reproduce:

"I think that the law with reference to express contracts of indemnity is, that if a person has agreed to indemnify another against a particular claim or a particular demand, and an action is brought on that demand, he may then give notice to the person who has agreed to indemnify him to come in and defend the action, and if he does not come in, and refuses to come in, he may then compromise at once on the best terms he can, and then bring an action on the contract of indemnity. On the other hand, if he does not choose to trust the other person with the defence to the action, he may, if he pleases, go on and defend it, and then, if the verdict is obtained against him, and judgment signed upon it, I agree that at law that judgment, in the case of express contract of indemnity, is conclusive."

In the application before me the President had held the deceased was an employee of the plaintiffs and the defendants had chosen to ignore the cases in the Labour Office and in the Sessions Court and in this appeal there was nothing to show that the plaintiffs were not entitled to be indemnified except the bare denial of liability which I held was not sufficient to establish evidence for a *prima facie* defence.

I therefore dismissed the application with costs.

Application dismissed.

Solicitors: *Dulip Singh & Co.; Shearn Delamore & Co.*

KENTUCKY FRIED CHICKEN (M) SDN. BHD. v. LEMBAGA BANDARAN, PETALING JAYA

[A.Cr.J. (Harun J.) December 16, 1975]

[Kuala Lumpur — Selangor Criminal Application No. 27 of 1975]

Criminal Law and Procedure — Appeal — Notice of — Whether filed out of time — Question of when does period for Notice of Appeal run — Criminal Procedure Code (F.M.S. Cap 6), ss. 307(i), 310 — Interpretation Act, 1967, s. 54 — Interpretation and General Clauses Ordinance, 1948.

The applicants were convicted and sentenced under the Petaling Jaya Town Area By-Laws, 1957 by the learned magistrate on September 11, 1975. Being dissatisfied with the decision of the learned magistrate, the applicants filed a Notice of Appeal on September 11, 1975 and on September 23, 1975, the learned magistrate by letter returned the Notice of Appeal to the applicants on the ground "that the Notice is filed out of time". The learned magistrate ruled that the ten-day period under section 307(i) Criminal Procedure Code ran from September 11, 1975 and the last date was September 21, 1975. The applicants argued that the date ran from September 12, 1975 and the last date was September 22, 1975

The applicants applied under section 310 of the Criminal Procedure Code to determine whether the Notice of Appeal was filed within the prescribed time or alternatively for extension of time within which to file the Notice of Appeal.

Held: as the sentence was passed on September 11, that day should be excluded and the period for the Notice of Appeal ran from September 12. In this case the applicants had filed their Notice of Appeal within the prescribed time.

CRIMINAL APPLICATION.

Lawrence Tan Hui Seng for the applicants.

Ee Chin Seng (Deputy Public Prosecutor) for the respondents.